CATTANACH V MELCHIOR: BABIES, BLESSINGS AND BURDENS

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This article considers the High Court decision of Cattanach v Melchior*, which permitted the recovery of damages for the cost of raising a child born through medical negligence. It discusses the reasoning in each of the judgments and seeks to identify themes so as to explain the divide between the majority and minority. It also considers the impact of legislative intervention in Queensland and New South Wales.*

INTRODUCTION

In the decision of *Cattanach v Melchior*,[2] the High Court decided that parents should be able to recover damages for the cost of raising an unplanned child who was born as a result of negligent advice about a sterilisation procedure.

The case is a controversial one attracting attention not only from lawyers but also the media and the general public. Politicians have also weighed into the debate with a number of political leaders making strong statements about the need to legislate to overturn the decision.[3]

The question is indeed a difficult one and this is reflected in the different approaches within the High Court. That six separate, and very different, judgments were delivered indicates the diversity of opinion. It is for this reason that it is worth examining each of the judgments in some detail.

FACTS AND HISTORY

Mr and Mrs Melchior were married in 1984 and had two daughters in 1985 and 1988 respectively. For various reasons, they decided to limit their family to two. In the face what she felt was her husband's procrastination, Mrs Melchior was referred to Dr Cattanach by her general practitioner for a sterilisation procedure.

During a consultation, Mrs Melchior told Dr Cattanach that her right ovary and fallopian tube had been removed during an appendectomy that occurred when she was fifteen. In fact, only her ovary had been removed and the right

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[2] *Cattanach v Melchior* [2003] HCA 38 (16 July 2003). Now reported at (2003) 199 ALR 131.

[3] See for example, 'Carr Seeks to Protect Doctors', *Australian Financial Review*, 18 July 2003 and 'Birth Law to Restrict Liability of Doctors', *Courier Mail*, 18 July 2003, which note adverse comments about the case by the Attorney-General Mr Rod Welford MP, the Deputy Prime Minister Mr John Andersen MP and by the New South Wales Premier Mr Bob Carr MP.

fallopian tube remained intact. An ultrasound scan revealed no evidence of the right fallopian tube being present.

Later, a tubal ligation was conducted successfully on the left fallopian tube. During this operation, Dr Cattanach found no evidence of the right fallopian tube being present and intact. However, the right tube was in fact still present although it was obscured by bowel adhesions resulting from the appendectomy. The tube was convoluted, compressed and not in its usual position.

A finding of negligence was made because Dr Cattanach had too readily and uncritically accepted the patient's assertion that the right fallopian tube had been removed. Important facts were that Mrs Melchior was only fifteen at the time of her appendectomy operation, that this assertion was made 25 years later, and that there was no positive confirmation of the tube's removal during the operation. The trial judge, Holmes J, concluded that a reasonable doctor would have advised her of the increased risk of getting pregnant, having not been able to confirm the absence of the right fallopian tube. She also found that a reasonable doctor would have advised Mrs Melchior of the possibility of investigating this further. There was a procedure called a hysterosalpingogram, which if conducted, would have revealed the existence of the right fallopian tube.

Mrs Melchior fell pregnant and gave birth to Jordan, who is a normal, healthy, active child in all respects.

Holmes J awarded damages to Mrs Melchior associated with the physical damage and consequential economic loss that arose out of the pregnancy and birth. She also awarded damages to Mr Melchior for loss of consortium. Finally, Holmes J also awarded damages to both Mr and Mrs Melchior for the cost of raising Jordan until he was 18.[4]

Dr Cattanach appealed to the Queensland Court of Appeal challenging Holmes J's finding that he had been negligent, and on the awarding of damages for the cost of raising Jordan.[5] On the issue of liability, McMurdo P, Davies JA and Thomas JA all agreed that the appeal should be dismissed.[6] The appeal was also dismissed in relation to the awarding of damages for the cost of raising a child, although Thomas JA dissented on this point.

Dr Cattanach appealed to the High Court, and the sole issue for its consideration was whether damages for the cost of raising a child should be awarded.

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[4] *Melchior & Anor v Cattanach & Anor* [2000] QSC 285 at [81] where Holmes J summarises the damages awarded.

[5] *Melchior v Cattanach & Anor* [2001] QCA 246.

[6] Although Thomas JA did so 'with some reservation': *Melchior v Cattanach & Anor* [2001] QCA 246 at [132-133].

THE HIGH COURT: THE MAJORITY

A majority of McHugh, Gummow, Kirby and Callinan JJ dismissed the appeal and confirmed that damages may be awarded to a parent for the cost of raising a child born as a result of medical negligence.

MCHUGH AND GUMMOW JJ

McHugh and Gummow JJ started from the premise that 'the appellants would be liable under ordinary principles for the foreseeable consequences of Dr Cattanach's negligence.'[7] It was necessary, therefore, to show some compelling policy reasons for creating an exception to established law.

The relevant policy reasons identified included the importance of human life, the stability of the family unit and the nurture of the infant child until his or her legal majority.[8] McHugh and Gummow JJ accepted that these considerations were important, but felt that the critical question was whether these considerations should actually preclude recovery of this head of damages.[9] The judgment cautioned against the 'beguiling but misleading simplicity to invoke broad values which few would deny and then glide to the conclusion that they should operate to shield …' a person from the full legal consequences of negligence.[10]

McHugh and Gummow JJ concluded that these public policy considerations relied upon by Dr Cattanach did not justify a refusal to award these damages. In reaching this conclusion, they identified some important limits or flaws in the reasoning that underpinned these policy considerations. One was to reject the suggested characterisation of the parent-child relationship as being the relevant damage suffered in this case. Such a characterisation leads to the conclusion that, as a matter of policy, this is a loss that the law should not recognise. McHugh and Gummow JJ rejected that approach and instead thought that the actual loss suffered was better described as being the past and future expenditure on their child.[11]

The argument that the birth of a child is always a blessing was also rejected as this is inconsistent with permitting compensation for the pregnancy itself, and it is also inconsistent with the widespread use of contraception.[12] Concerns about possible harm to familial relationships should Jordan become aware of the litigation were also rejected because without any evidence or clear understanding on this point, it was merely speculation.[13] McHugh and Gummow JJ also criticised the inconsistency between the policy arguments that value the importance of human life and the reliance by Dr Cattanach on

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[7] *Cattanach v Melchior* [2003] HCA 38 at [51].
[8] *Ibid*, as summarised at [76].
[9] *Ibid*.
[10] *Ibid* at [77].
[11] *Ibid* at [67].
[12] *Ibid* at [79].
[13] *Ibid*.

the child being born *healthy*. A decision to award damages or not depending on the health of a child undermined the strength of those policy arguments, as this suggested that the value of human life may be less if the child is disabled.[14]

A subsidiary argument also rejected by McHugh and Gummow JJ was that if such damages were awarded, then they must be set off against the benefits of having a healthy child.[15] The joy of having a child was not the 'same interest' as the cost of raising him or her. The two were not comparable and so were not capable of being set off against each other.[16]

KIRBY J

Kirby J's review of legal authority from around the world revealed that the majority of jurisdictions have adopted various mechanisms to exclude, at least to some extent, damages for the cost of raising a child born as a result of negligence in sterilisation.[17] However, these mechanisms generally involve an arbitrary cut-off point after which damages are not recoverable.[18] Further, this point is often determined by reference to what Kirby J regards as inappropriate ethical or moral considerations.[19] Although legislatures may be able to establish such cut-off points,[20] judges are not permitted to adopt arbitrary departures from established legal doctrine. Their obligation is to develop the law in a manner consistent with past decisions.[21]

In this case, the loss was not pure economic loss because it flowed from the physical injury that resulted from negligent advice.[22] Accordingly, the decision should be made using the ordinary principles of negligence[23] which, in this case, permitted recovery. Any departure from this established position required strong and clear public policy reasons. Those advocating such a departure were not successful in justifying this step as a matter of law. Instead, much of the argument in favour of precluding recovery of these damages proceeded on the basis of 'personal religious beliefs or "moral" assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy.'[24] These considerations did not justify a failure to apply established law.

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[14] *Ibid* at [78].
[15] *Ibid* at [54].
[16] *Ibid*, for example, at [90].
[17] *Ibid* at [134].
[18] *Ibid*.
[19] Examples cited include references to the Bible and the supposed opinion of the passenger on the London Underground: *Cattanach v Melchior* [2003] HCA 38 at [135].
[20] See below for the position in Queensland and New South Wales after legislative intervention.
[21] *Cattanach v Melchior* [2003] HCA 38 at [137].
[22] *Ibid* at [148-9].
[23] That is, without the need to resort to the special tests that govern the recovery of pure economic loss: *Cattanach v Melchior* [2003] HCA 38 at [150].
[24] *Ibid* at [137].

The review of past legal authorities revealed five competing choices, which Kirby J addressed in turn. The first choice was to preclude recovery of any damages (including those associated with the pregnancy) where the child is born healthy. Most of the arguments for this choice reflected an opinion that the birth of a baby is a blessing, not a detriment, so it is offensive to seek compensation for the cost of raising the child.[25] The blessing argument has two aspects.[26] The first is that a blessing cannot constitute 'harm' because this would require the court to conclude that the parent would be better off if the child hadn't been born. The second aspect is that any harm is overwhelmed by the joy of the child. Kirby J's response to this, however, was that the harm is not the child but his or her economic consequences.[27] Further, refusal to permit recovery of any damages would create an undesirable zone of legal immunity for doctors engaged in sterilisation.[28]

Other subsidiary arguments put forward in support of the option of awarding no damages were also addressed by Kirby. The difficulties identified in calculating the cost of raising a child were rejected as the courts already assess other nebulous heads of damages and in any event, these calculations are already available having been compiled in other contexts.[29] Concerns that a child may feel unwanted if he or she hears about the litigation were rejected as unconvincing, particularly as the distinction between suing for an unwanted child and the economic costs of raising a child can be explained.[30] Finally, worries that litigation may encourage parents to love their children less were considered 'sheer judicial fantasy' and not supported by real world evidence.[31]

A second option was to award damages but to draw a line soon after the delivery of the child. This is the position in the United Kingdom after *McFarlane v Tayside Health Board* ('*McFarlane*'),[32] although the individual judges in the House of Lords did not agree upon what these damages will include.[33] In jurisdictions that adopt this approach, the justification for drawing the line between the costs associated with pregnancy and the cost of raising a child was usually not articulated. Generally, there is only 'a passing nod towards the law's respect for the sanctity of life, the blessings of children and

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[25] *Ibid* at [141-2].
[26] *Ibid* at [147].
[27] *Ibid* at [148].
[28] *Ibid* at [149-150].
[29] *Ibid* at [144].
[30] *Ibid* at [145].
[31] *Ibid*.
[32] *McFarlane v Tayside Health Board* [2000] 2 AC 59. *McFarlane* was recently affirmed in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52 (16 October 2003), subject to an 'important gloss'. That gloss was to recognise that although the cost of raising the child should not be recoverable, a legal wrong had still been suffered beyond the cost of the actual birth and that that wrong should be recognised by a conventional award of 15 000 pounds (see Further Developments below).
[33] *Cattanach v Melchior* [2003] HCA 38 at [156-158].

the important of the family unit, and occasional invocations of Scripture.'[34] Kirby J rejected this option as 'arbitrary and unjust' as there is no principled reason for making this distinction.[35]

A third option permitted recovery for the costs of raising a child with a disability, beyond those associated with the normal costs of a healthy child. Kirby J rejected this distinction because it is arbitrary[36] and because it reinforces negative views about disability that are inconsistent with the values of Australian law.[37] A further argument against this was difficulties that have arisen in the United Kingdom where this option has been adopted by some courts after *McFarlane*.[38] The difficulties in maintaining coherence and consistency in this area of law when taking such an approach provide a warning for the courts in Australia.[39]

A fourth option involved assessing the 'net' loss suffered, which entails reducing the cost of raising the child in light of the emotional benefits he or she brings.[40] In *McFarlane*, some judges used this approach to conclude that the benefits entirely outweigh the disadvantages so no damages should be recovered at all.[41] This approach was not adopted by Kirby J because it involves set offing incomparable benefits and burdens.[42] Such an option is inconsistent with Australian law and cannot be justified by existing legal principle.[43]

The final option, and the one adopted by Kirby J, was that damages for the cost of raising a child should be recoverable.[44] Having rejected the policy arguments put forward to justify a departure from established legal principle, this was the result required by the application of the general rules of negligence.[45]

CALLINAN J

Callinan J characterised the claim as one for economic loss[46] and because all of the considerations in *Perre v Apand Pty Ltd*[47] permitted recovery, damages

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[34] *Ibid* at [159].
[35] *Ibid* at [162].
[36] *Ibid* at [164].
[37] *Ibid* at [166].
[38] See, for example, *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266.
[39] *Cattanach v Melchior* [2003] HCA 38 at [128] and [163].
[40] *Ibid* at [168].
[41] *Ibid* at [170].
[42] *Ibid* at [172].
[43] *Ibid* at [173].
[44] *Ibid* at [176].
[45] *Ibid*.
[46] *Ibid* at [299] and [302].

for the cost of raising the child should be awarded.[48] Although the preponderance of the international authorities precluding recovery should not be disregarded lightly,[49] '[n]o identifiable, universal principle of public policy dictates any different result' than recognising this head of damages.[50]

In evaluating the different considerations raised in this area, Callinan J observed that almost all of the arguments denying recovery of these damages draw on 'emotional and moral values and perceptions' of public policy.[51] However, he found that these arguments did not 'commend themselves in law' to him.[52] For example, just because damages are hard to assess with precision, or at all, did not preclude recovery because the courts already make assessments of these kinds.[53] In any event, the cost of raising a child is not that difficult to assess with some precision.[54]

Further, the benefits of parenthood cannot be equated to, or set off against, the financial cost of rearing the child.[55] Nor was there reason to think that such a child will not be as loved if the parents are compensated for the cost of his or her upbringing.[56] A final example was that there are many harsher truths for children to deal with than that they were not wanted at the moment of their conception.[57] In addition to his reservations about the public policy reasons used to justify precluding an award of these damages, Callinan J also pointed to the need to avoid legal immunity for doctors performing this kind of work.[58]

THE HIGH COURT: THE MINORITY

A minority of Gleeson CJ, Hayne and Heydon JJ disagreed and refused to permit recovery of these damages.

GLEESON CJ

Gleeson CJ classified the claim as one for economic loss and relied heavily on the fact that it was a joint award to both Mr and Mrs Melchior, rather than being loss simply consequential upon Mrs Melchior's physical damage

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[47] *Perre v Apand Pty Ltd* (1999) 198 CLR 180. *Perre* outlines a number of touchstones that indicate when recovery should be permitted and some disqualifying conditions that suggest when recovery should be refused.
[48] *Cattanach v Melchior* [2003] HCA 38 at [299].
[49] *Ibid* at [297].
[50] *Ibid* at [299].
[51] *Ibid* at [292].
[52] *Ibid* at [301].
[53] *Ibid* at [297], cf [292].
[54] *Ibid* at [297].
[55] *Ibid* at [298], cf [292].
[56] *Ibid* at [298].
[57] *Ibid* at [301], cf [292]
[58] *Ibid* at [295].

through pregnancy.[59] Therefore, because it was a 'claim for recovery of pure economic loss arising out of a relationship, then it can scarcely be asserted with any degree of plausibility that legal principle or authority leads inexorably to the result…' that the cost of raising their child was compensable.[60] Pure economic loss categories develop incrementally and it must be demonstrated that this new category should be recoverable. Gleeson CJ concluded that the below policy considerations should not permit an incremental development of the common law to permit recovery of these damages.[61] Informing this exercise was the conclusion that an integral aspect of the damage sustained by the Melchiors was the parent-child relationship.[62]

In deciding whether this damage should be recognised, the policy considerations that limit recovery in cases of pure economic loss were considered. The first policy consideration was that the law seeks to avoid recognising loss that could be indeterminate.[63] Gleeson CJ pointed to the potential for other wide reaching claims for compensation such as those covering loss occurring after the child's 18th birthday, the adverse impact of a child on his or her parents' careers and the potential cost of weddings or other similar expenses.[64]

A second policy consideration was that the law is reluctant to recognise loss that is incapable of precise definition.[65] It is very difficult to measure accurately the impact that a child has on the lives of his or her parents and which of these changes would count as economic harm capable of being compensated.[66] There is also the possibility that the child upon reaching maturity may in fact provide financial benefits for the parent.[67] A third policy consideration was that the law seeks to ensure when recognising loss that such recognition will relate coherently with other rules of the common law and statute.[68] Gleeson CJ argued that recognition of this head of damages was inconsistent with the law's refusal to recognise a child's own birth as actionable and the general duties imposed by law on parents to take care of their children.[69]

Another more general consideration in this area was how or whether the loss of the Melchiors should be measured. Reasonable restitution is all that can be required to compensate their loss but this raised the issue of how the emotional and other benefits of the child should be accounted for: an issue of

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[59] *Ibid* at [19].
[60] *Ibid* at [30].
[61] *Ibid* at [39].
[62] *Ibid* at [25].
[63] *Ibid* at [32].
[64] *Ibid*.
[65] *Ibid* at [33].
[66] *Ibid*.
[67] *Ibid* at [34].
[68] *Ibid* at [35].
[69] *Ibid*.

set offs.[70] Gleeson CJ was of the view that compensation cannot be provided for the financial disadvantages while ignoring the other advantages of parenthood.[71] Further, the parental relationship was not regarded by the community as being primarily a financial relationship.[72] Indeed, it is a human relationship seen as being fundamental to society.[73] Therefore to 'seek to assign an economic value to the relationship … is neither reasonable nor possible.'[74]

HAYNE J

Hayne J's starting premise was that if Mrs Melchior suffered loss due to negligence, then justification was needed to deny the recovery of damages for that loss.[75] He argued against resolving this question by classifying the claim and indeed, specifically did not categorise it as a claim for pure economic loss.[76]

Before addressing his main argument, Hayne J considered some of the arguments generally put forward as being relevant to the claim as well as the corresponding criticisms. Those addressed included the 'blessing' argument,[77] concerns about setting off and the impossibility of accurately predicting the loss suffered,[78] worries about damaging the child,[79] the motives of the parents in seeking sterilisation[80] and suggestions that the child could have been aborted or adopted.[81] In the course of discussing these matters, Hayne J concluded that neither the arguments nor the counter arguments denied that a child brings both burdens and benefits to his or her parents.[82]

Hayne J's main argument was that considerations of public policy decide this case.[83] He traced the role of public policy in the development of the common law and concluded that it was a legitimate source for judges to draw upon when making these sorts of choices.[84] His public policy argument to preclude recovery was made in two steps. The first step was to find that the consequences of Dr Cattanach's negligence brought both detriments and benefits. To focus only on economic detriments and ignore non economic

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[70] *Ibid* at [36].
[71] *Ibid* at [37].
[72] *Ibid* at [38].
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid* at [192].
[76] *Ibid* at [193].
[77] *Ibid* at [195]-[197].
[78] *Ibid* at [199]-[201].
[79] *Ibid* at [202]-[204].
[80] *Ibid* at [205]-[210].
[81] *Ibid* at [220]-[222].
[82] *Ibid*, for example, at [197], [201].
[83] *Ibid* at [194]. Although he acknowledged the overlap that public policy has with those arguments discussed earlier in his judgment.
[84] *Ibid* at [227].

benefits did not take sufficient account of the full consequences of that negligence.[85]

The second step then sought to evaluate the loss to the parent and argued that all burdens and benefits, both economic and non economic, should be considered, in spite of any difficulties in measuring them.[86] It may be impossible to set off these benefits and burdens, in which case no value can be sensibly attributed to the claim.[87] Alternatively, if some reasonable assessment can be made, then the law must choose if it wishes to allow that calculation to take place.[88] Hayne J concluded that it should not 'because it would be necessary to put a price on the value *to the parent* of the new life.'[89] In reaching this conclusion, he adopted the quote of Lord Millett in *McFarlane*:

> 'If the monetary value of the child is assessed at a sum in excess of the costs of maintaining him, the exercise merely serves to confirm what most courts have been willing to assume without it. On the other hand, if the court assesses the monetary value of the child at a sum less than the costs of maintaining him, it will have accepted the unedifying proposition that the child is not worth the cost of looking after him.'[90]

Hayne J decided that public policy should prevent parents from harming their child by being able to prove that the burdens of raising him or her outweigh the benefits.[91] Interestingly, he specifically addressed the issue of a child with 'special needs' and concluded that additional costs over and beyond those associated with the rearing of a normal child may be recoverable.[92]

HEYDON J

In rejecting recovery of these damages, Heydon J identified a number of errors in the reasoning of the majority of the Queensland Court of Appeal. The first was that it 'failed to take sufficient account of the law's assumptions about some key values in family life'.[93] The law assumes that children's interests prevail over other interests, that parents have significant duties to their children, that those interests are best advanced by nurture in a stable marriage, and that publicity connected with litigation involving children should be avoided.[94] The courts have intervened throughout history to protect

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[85] *Ibid* at [248].
[86] *Ibid* at [249]-[250].
[87] *Ibid* at [250].
[88] *Ibid* at [251].
[89] *Ibid* at [255] (original emphasis).
[90] *Ibid* at [257], quoting Lord Millett in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 111.
[91] *Cattanach v Melchior* [2003] HCA 38 at [259].
[92] *Ibid* at [256]. Hayne J suggests that those additional costs to meet these needs do not deny or diminish the benefits of being a parent to the child. [263]
[93] *Ibid* at [322].
[94] *Ibid* at [323].

children and their interests, including where those interests have conflicted with the interest of their parents.[95]

A second error made by the Court of Appeal was that it failed to consider the type of litigation that awarding these sorts of damages would permit.[96] To maximise recovery, parents may hold out 'unrealisable hopes' which their children will never achieve.[97] Parents may also claim of family traditions (or create them after the birth) which will unreasonably increase their damages.[98] Finally, parents may exaggerate the physical or mental incapacities of their child to maximise damages.[99] Litigation of this sort, and the claims it would encourage, is in conflict with the interests of children already described.[100]

Heydon J concluded that these errors lead to the reasoning of majority of the Court of Appeal being invalid for three reasons.[101] The first reason was that it is not possible to treat the costs of raising a child as damage.[102] The nature of the child, the nature of the parent-child relationship and the duties that arise on human birth make it wrong to place a value on human life or the expense of human life.[103] The second reason was based upon the undesirable temptations for parents to make claims in litigation that are contrary to the child's best interests already discussed.[104] It was thought that this sort of litigation would create an 'odious spectacle'.[105]

The third and final reason put forward by Heydon J as to why the reasoning of the majority of the Court of Appeal was invalid was because of the negative impact on the child upon learning of the litigation.[106] After considering a range of judicial opinions expressed in many different jurisdictions, and after critiquing the arguments relied upon in the Court of Appeal, Heydon J concluded that permitting such damages should be refused because this 'would tend to damage the natural love and mutual confidence which the law seeks to foster between parent and child.'[107]

One inconsistency in refusing this head of damages but permitting more general recovery of damages for the pregnancy is that a child may still learn of the litigation.[108] Heydon J acknowledged this concern but suggested that a partial answer is that this is a 'justifiable compromise' that recognises the

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[95] *Ibid* at, for example, [324]-[325].
[96] *Ibid* at [322], [339].
[97] *Ibid* at [344].
[98] *Ibid* at [345].
[99] *Ibid* at [346].
[100] *Ibid* at [339].
[101] *Ibid* at [347].
[102] *Ibid* at [352].
[103] *Ibid* at [352]-[353].
[104] *Ibid* at, for example, [371].
[105] *Ibid* at [347].
[106] *Ibid* at [373].
[107] *Ibid* at [404].
[108] *Ibid* at [410].

mother's loss but does not involve any consideration of the child in the litigation.[109] Alternatively, perhaps this inconsistency demonstrates that the entire claim should not be recognised.[110]

THEMES

In a case where the High Court delivers six separate judgments, one of the challenges is to identify particular themes that unite or divide the seven judges. A critical difference in the legal reasoning of the majority and the minority was whether the economic burdens of raising a child can or should be set off against non financial factors. Each of the minority judges, and particularly Hayne J, relied on the impossibility or inappropriateness of balancing the economic cost of a child against his or her non economic consequences. This meant that damages of this kind either could not or should not be awarded.

By contrast, the majority judges were able to avoid this balancing exercise by finding that such a set off was not permitted by law. Comparing dissimilar factors was described 'comparing apples to oranges'.[111] Accordingly, it was permissible for the award of damages to be determined purely on the economic cost of the child, without, for example, having to subtract the benefit of the joy and happiness that he or she brings to his or her parents. This finding was a critical one because it is very unlikely that all (or indeed any) of the majority judges would have been comfortable recognising these damages if they had been obliged to engage in these kinds of calculations.

But not all themes in the judgments accurately reflect the majority-minority divide that decided the case. A good example is how the issue of whether such damages should be awarded or not was approached. All of the majority tackled the question with an initial view that the ordinary principles of negligence permit the awarding of these damages unless there were cogent reasons otherwise. Interestingly, this was also the view of Hayne J from the minority. Only Gleeson CJ and Heydon J disagreed. Gleeson CJ treated the claim as one for pure economic loss, and as the categories of that loss develop incrementally, it was for the Melchiors to show why this new head of damages should be recognised.[112] Heydon J seemed to accept that such an award involved a new step in the law, and so cast a burden on the plaintiffs to justify it.[113]

A better example of diverging opinions within the majority and minority views, and indeed within the court as a whole, was on the issue of whether the claim should be regarded as pure economic loss. As mentioned already, Gleeson CJ classified the claim in this way, and this characterisation was central to his

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[109] *Ibid* at [411].
[110] *Ibid*.
[111] *Ibid* at [172] per Kirby J, quoting *Johnson v University Hospitals of Cleveland* 540 NE 2d 1370 at 1374 (1989).
[112] *Cattanach v Melchior* [2003] HCA 38 at [30].
[113] *Ibid* at [315].

final decision. Callinan J was of a similar view as to the nature of the loss,[114] and it was also classified in this way by the trial judge and all of the Court of Appeal.[115] Finally, although Heydon J did not specifically categorise the loss, it seems that he may also have considered it to be economic loss.[116]

By contrast, Kirby J considered the economic loss to be consequential only as it flowed from the physical injury to Mrs Melchior.[117] Hayne J also did not categorise the claim as one of pure economic loss, although in addition, he argued against resolving this case by classifying the claim.[118] McHugh and Gummow JJ agreed with the latter part of Hayne J's conclusions as they declined to categorise the loss on the ground that it did not advance the understanding of the issues.[119] Although the characterisation of this harm was complicated by the existence of Mr Melchior, who had suffered no physical loss,[120] it is difficult to extract any valuable guidance from this case as to when a loss will considered to be purely economic.

A final theme, and the one most pivotal to the outcome in this case, was the role of public policy. Although the different legal issues already discussed had a significant impact, underpinning all of that reasoning, often explicitly, were public policy arguments. All of the majority, as well as Hayne J, considered whether public policy justified departing from the ordinary principles of negligence to refuse to award these damages. The majority concluded that public policy did not warrant such a conclusion. By contrast, Hayne J regarded these considerations as determinative and refused to permit recovery of these damages. The remainder of the minority also relied heavily on public policy considerations. Although these considerations did not need to play a disqualifying role, given that their starting point was that recovery of these damages should be refused unless otherwise justified, public policy arguments were still used to support their views. Heydon J, in particular, relied heavily on these considerations.[121]

Hence the weight assigned to public policy in this case was a marker for whether a judge was part of the majority or minority. Every judge in the majority rejected the application of public policy arguments because these reasons did not justify departing from established legal principle. Conversely, every judge in the minority relied heavily on public policy either to justify their conclusion to refuse these damages or to permit departure from the general rules of negligence. Interestingly, what might be regarded as one of the ironies of this case is that the less conservative position was arrived at by

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[114] *Ibid* at [299].

[115] *Ibid*.

[116] *Ibid* at, for example, [319] and [411] which provide at least some indication that Heydon J may be assuming that the loss is economic loss.

[117] *Ibid* at [148]-[149].

[118] *Ibid* at [193].

[119] *Ibid* at [66].

[120] *Ibid.* See, for example, the differing approaches of Gleeson CJ at [19] and Hayne J at [188]-[189].

[121] See Kirby J's criticism of what he regards as inappropriate reliance on public policy by some judges in the minority: *Cattanach v Melchior* [2003] HCA 38 at [151].

insisting on the application of established legal principle and by resisting reference to wider public policy considerations.

FURTHER DEVELOPMENTS

LEGISLATIVE INTERVENTION

In Queensland, *Cattanach* did not remain law for long. The day after the decision was handed down, the Attorney-General, Mr Rod Welford, stated his intention to introduce legislation to overrule the decision.[122] That promise became law in November, when the *Justice and Other Legislation Amendment Act 2003* (Qld) inserted Part 5 of Chapter 2 into the *Civil Liability Act 2003* (Qld). The Part states:

> **"PART 5—AWARDS FOR ECONOMIC LOSS FOLLOWING STERILISATION PROCEDURE OR CONTRACEPTIVE PROCEDURE OR ADVICE**
>
> **"49A Failed sterilisation procedures**
>
> (1) This section applies if, following a procedure to effect the sterilisation of an individual, the individual gives birth to, or fathers, a child because of the breach of duty of a person in advising about, or performing, the procedure.
>
> *Examples of sterilisation procedures—*
> *Tubal ligation and vasectomy.*
>
> (2) A court can not award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child.
>
> **"49B Failed contraceptive procedure or contraceptive advice**
>
> (1) This section applies if, following a contraceptive procedure on an individual or the giving of contraceptive advice to an individual, the individual gives birth to, or fathers, a child because of the breach of duty of a person in advising about, or performing, the procedure or giving the advice.
>
> (2) A court can not award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child."

When introducing the Bill, Mr Welford made clear that the amendment relates only to the cost of raising a healthy child and will not exclude claims for the additional cost associated with a child's disability.[123] Also of particular interest

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[122] *Queensland Acts to Protect Medical Sterilisation Services*, Mr Rod Welford MP, Ministerial Media Statement, 17 July 2003, http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=13456&db=media viewed 27 August 2003.
[123] *Hansard*, 21 August 2003, p3177.

is s49B which goes further than simply overturning *Cattanach*. This section was added after the amending Bill was introduced into Parliament and also limits damages in situations where a child is born as a result of negligently performing or advising about a contraception procedure or giving negligent contraceptive advice.

Queensland is not the only State to take legislative action following the decision, with New South Wales recently adding Part 11 to its *Civil Liability Act 2002* (NSW). This new Part seeks to achieve similar goals to the Queensland legislation although it takes a slightly different approach in that there is no reference to sterilisation or contraception. Instead, the amendment operates to restrict the awarding of damages in cases involving 'a claim for the birth of a child': s71(1). It also specifically excludes the awarding of damages not only for the cost of raising a child, but also any loss of earnings associated with that responsibility: s71(1).

This legislation in Queensland and New South Wales is consistent with the recent tort reform trends that seek to restrict civil liability, and particularly the liability of the medical profession.[124] Indeed, the primary reasons given by Mr Welford for introducing this amendment were concerns about the affordability of medical indemnity insurance and the related issue of ensuring the continued availability of these procedures.[125] It will be interesting to see whether any future decisions of the High Court that do not accord with this trend of legislative reform will also receive Parliamentary attention.

AN ENGLISH CASE

A final further development is the recent decision in *Rees v Darlington Memorial Hospital NHS Trust ('Rees')*[126] where the House of Lords was invited to reconsider its decision in *McFarlane*. In *Rees*, a woman sought sterilisation because she considered that her visual disability would prevent her from raising a child properly. The operation was performed negligently and a healthy child was born as a result. The House of Lords affirmed its decision in *McFarlane*[127] and, by a bare majority, refused to award damages for the additional cost of raising the child that was due to the mother's disability. This decision sits uncomfortably with the English Court of Appeal decision in *Parkinson v St James and Seacroft University Hospital NHS Trust,*[128] which permitted recovery for the additional cost of raising a child with a disability.

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[124] See Kirby J's uncomplimentary comments on the tort reform currently taking place in Australia: *Cattanach v Melchior* [2003] HCA 38 at [137].

[125] *Hansard*, 21 August 2003, p3177.

[126] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52 (16 October 2003).

[127] Although as discussed above, the affirmation of *McFarlane* was subject to an important gloss: that a legal wrong had still been suffered beyond the cost of the actual birth and that that wrong should be recognised by a conventional award of 15 000 pounds.

[128] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266.

How the law should treat disability in either the mother or the child is troublesome in this context, and this was evident in the difficulties that the English courts experienced after *McFarlane*, as noted by Kirby J in *Cattanach*. It may be that the courts will seek to remove the anomalies that exist in this area, with the end result being that *Parkinson* is overruled. Three of the majority in *Rees* have made their intentions relatively clear if the House of Lords is called upon to revisit the issue. Lord Bingham of Cornhill and Lord Nicholls of Birkenhead expressly rejected *Parkinson*, while Lord Scott of Foscote left the point open but doubted the correctness of that decision. Although the decision in *Rees* does not directly affect the law in Australia or in Queensland, this issue of disability does highlight some of the difficulties in this area. Given that the Queensland and New South Wales legislation create a dichotomy based on disability, any further development of this area of law in the United Kingdom should be watched closely.